SUPREME COURT, U. S.

DEC 18 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 788

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,

Petitioner,

for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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Jurisdiction

The main issues on the merits involve the interpretation of a New York Automobile Accident Indemnification Endorsement on a policy of liability insurance issued by the petitioner, and whether said endorsement exists independently and apart from insurance policy to which it is annexed.

Petitioner, pursuant to Rule 19 of this Court, has failed to demonstrate that a substantial federal or constitutional question is at issue, or that there is conflict with any other state law, or with a decision of another Court of Appeals on the same matter.

In fact, the petitioner failed to raise any such question in the Supreme Court of the State of New York, in the Appellate Division, First Department, of the State of New York, or in the Court of Appeals of the State of New York, until it moved for leave to re-argue the decision and order of the Court of Appeals, which affirmed the lower court decisions and orders.

In *Ellis* v. *Dixon,* N. Y. 1955, 75 S. Ct. 840, 349 U. S. 458, the court ruled that where questions were not raised in state court proceedings, certiorari would not be permitted.

Examination of the opinion in the Court of Appeals, pages 18-22 of Petitioner's Appendix "B", the Remittur dated July 2, 1968, pages 23-25 of petition, the order of the Court of Appeals, dated October 10, 1968, page 26 of Petition, clearly reveals absence of any federal or constitutional question. Petitioner has failed to move to amend the remittur in the state court to show a constitutional or federal question, and accordingly under the decision of this court in *Ungar* v. *Sarafite,* 376 U. S. 575, 84 S. Ct. 841, certiorari should not be permitted.

Respondents' Argument

Petitioner claims that the Insurance Law of the State of New York, Article 17A, has impaired its obligation of contract under the New York Indemnification Endorsement because of certain exclusionary language therein.

Judge Matthew Jasen of the Court of Appeals, page 21 of Petition answers this contention by stating that in this matter of first impression, the decisions in the courts be-

low have been conflicting and irreconcilable, thus, indicating ambiguity of language and doubt of meaning, and not clear unambiguous language as contended by the petitioner, and that said endorsement required by state law be considered to exist independently from the standard policy and that it remains viable even though liability under the main liability policy has been disclaimed. This is the crux of the matter and the court unanimously agreed that said endorsement was to be construed as a separate instrument.

Actually the court for the first time analyzed the endorsement, reconciled provisions that were contradictory and/or ambiguous, and interpreted in very definite and simple terms the obligations under said endorsement. This does not mean that obligations under said contract were impaired. In this ruling the court followed the age old principal of construing said contract in a manner most favorable to the insured and one which results in coverage, rather than a denial of coverage as previously enunciated by said court in *Murphy* v. *Criterion Ins. Co.*, 57 Misc. 2d 52, and *Matter of Garcia (MVAIC)*, 41 Misc. 2nd 858.

In addition, the contention of judicial legislation is without merit as it has long been decided that the provision of Section 10, of Article I, of the Federal Constitution, protecting the obligation of contracts against State action is directed only against impairment by legislation and not by judgment of courts, as in this proceeding.

Barrows v. *Jackson*, 349 U. S. 249, 260, 73 Sup. Ct. 1031, 1037 (1953).

Tidal Oil Co. v. *Flanagan*, 264 U. S. 444, 451, 44 Sup. Ct. 197, 198.

CONCLUSION

Petition for Writ of Certiorari to the Court of Appeals of the State of New York should be denied on jurisdictional grounds and on the merits.

Respectfully submitted,

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